IN THE

Supreme Court of the United States

October Term, 1942

No. 201

AMERICAN MEDICAL ASSOCIATION, a Corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

No. 202

THE MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA, A CORPORATION, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONERS

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Reply to Respondent's Statement.

Respondent in its statement (Br. 5) summarizes what it says are the facts set forth in the indictment. That summary merely serves to emphasize the complete absence

of ultimate facts necessary to support the charge. The indictment does not charge a fixing of prices or a suppression of competition to the extent that prices were substantially affected to the injury of the public, concerning any one or all of the five activities alleged to have been restrained. Paragraphs 34 through 39 of the indictment (R. 14-21), which are the charging part, setting forth the conspiracy and its purposes, do not mention price fixing or suppression of competition.

Respondent says (Br. 14) that the selection of doctors for the staff of Group Health Association, Inc.[1] is in the hands of a medical director, but neglects to state that such employment must be approved by the lay board of trustees (R. 173). Respondent says that the board of trustees of GHA does not exercise any supervision over the professional relation between staff doctors and member patients, but neglects to state that the board of trustees can stop payment of an employee-doctor's salary at any time if they are not satisfied that the doctor sees a sufficient number of patients each day to satisfy them or for any other reason (R. 173).

Formation of the Conspiracy.

Respondent states (Br. 14) that American Medical Association[2] had for many years pursued a policy of opposition to all plans involving group practice on a risk-sharing basis. That this statement is not correct is immediately shown by the footnote on that page which says "at the same session (1934) AMA adopted certain principles to govern the conduct of medical service plans for families with limited means, one principle being that any such plan *should* (respondent inadvertently uses "must") include all legally qualified doctors in the locality, who wish to

[1] Sometimes hereinafter referred to as GHA.

[2] Sometimes hereinafter referred to as AMA.

give service under the conditions established" (R. 1087).

Respondent says that this meant that no plan providing for medical care by a salaried staff could obtain the approval of AMA, but petitioners insist that this principle did not purport to deal with or refer to doctors working on salary. Dr. West testified that in applying this principle each case must be decided on the facts presented (R. 1088). The fact is that there were in excess of 4,000 prepayment and postpayment plans operating throughout the country without the existence of any dispute or controversy with petitioners. The AMA analyzed all types of medical plans in existence in order to help persons to obtain medical service through such plans or with the assistance obtained from Government agencies (R. 224).

Respondent then says (Br. 14) that "the policy (of opposition) was established by its (AMA) House of Delegates". The Principles of Medical Ethics of AMA are a complete answer to those contentions. The Principles provide that "contract practice *per se* is not unethical" and then specifies certain features and conditions, which, if present, make a contract unethical (R. 860). There is nothing in those features or conditions that shows a policy of opposition as claimed by respondent. They show the contrary.

Respondent says (Br. 15) that this alleged policy of opposition to all plans involving group practice on a risk-sharing basis was actively enforced by the Judicial Council of AMA. Petitioners insist that could not be true because the jurisdiction of the Judicial Council is limited to appellate jurisdiction and then only concerns questions of law and procedure (R. 1034). Respondent says (Br. 16) that the Judicial Council repeatedly affirmed the expulsion of doctors because of their participation in such plans. The record shows only three instances from the years 1932 to 1938 and none of them bore the slightest resemblance to GHA. In two of them expulsion was affirmed by the Judi-

cial Council and in one (The Ross-Loos Case) the expulsion was reversed for errors in procedure (R. 1034). The record does not show that the reason for the expulsion in 1932 of certain doctors by the Dallas County (Texas) Medical Society was group practice on a risk-sharing basis. The provisions of the contract of employment in that case are not stated (R. 1031-1032). The basis of the expulsion of certain doctors from the Milwaukee County (Wisconsin) Medical Society in 1936 (R. 255) was stated (R. 256) to be solicitation of patients, advertising and contract practice contrary to sound public policy. But the terms of the contract of employment of doctors which is stated to be contrary to sound public policy is not contained in the record, so it is impossible to determine whether, even in this one isolated instance, the expulsion was because of a policy of opposition to all plans involving group practice on a risk-sharing basis. In fact, Dr. West, Secretary and General Manager of AMA, testified that AMA did not have a policy of opposition to plans involving group practice on a risk-sharing basis (R. 1034).

Respondent says (Br. 15) that much of the critical evidence of the conspiracy of which petitioners were convicted is found in minutes of meetings of the Medical Society of the District of Columbia [3] and its Executive Committee. It must be remembered that much of this hearsay evidence was admitted on the theory that Dr. Conklin, Secretary of DMS, and other persons making statements appearing in those minutes were co-conspirators, but they were found "not guilty", which destroys the basis for the admission of this evidence. Respondent then proceeds to use any and every statement made by a member of DMS or a member or ex-member of any committee of DMS as though such statement had been made by and was binding on DMS. Peti-

[3] Sometimes hereinafter referred to as DMS.

tioners insist that statements made by members of DMS and by members or ex-members of committees, or even by committees, are not binding on DMS. DMS is only bound by resolutions duly passed by a vote of its members or by resolutions passed by committees on subjects that have been duly and finally delegated to them by DMS. The only way voluntary societies like DMS can function is by meetings of its members who should be free to express their views pro and con. To use the statements made by members at such meetings as the basis for charging the Society with a criminal conspiracy is to destroy all society functions and to invade the constitutional right of free speech of the Society and its members.

Respondent (Br. 17) states "The report of this sub-committee, presented at the meeting of the Executive Committee on July 12, 1937 (R. 319-320) stated in part (R. 321):" Then follows excerpts from a letter dated July 12, 1937, from Dr. Verbrycke to Dr. McGovern. Respondent does not specifically state, but it leaves the inference that this letter was adopted by the Executive Committee. The fact is that it was rejected by the Executive Committee and ordered laid on the table (R. 336). Certainly respondent does not state, as we think it should, that the Executive Committee rejected this report and ordered it laid on the table.

Respondent states (B. 22) that in the October 2, 1937, issue of the AMA Journal, an article prepared by Dr. Woodward "denounced" the Group Health plan, and that the article embodies "suggestions" to the District Society of a course of action which might cripple Group Health. The words "denounced" and "suggestions" are unwarranted characterizations. The article truthfully and plainly stated the facts as they existed and performed the proper function of notifying members of the facts concerning GHA.

Respondent says (Br. 23) that on October 6, 1937, DMS adopted a resolution that it cause a copy of the Dr. Woodward article to be sent to each of its members as an indication of its future policies with respect to combatting the activities of GHA. Petitioners point out that the Woodward article does not advocate any combat with GHA. It merely stated the admitted facts and made fair comments thereon.

The publication and circulation of the Dr. Woodward article were but "an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress." *United States* v. *Hutcheson*, 312 U. S. 219, 243 (concurring opinion of Stone, J.)

Operation of the Conspiracy.

A. Boycott of Group Health and Its Staff by District Society and Its Members.

Respondent attempts (Br. 26) to leave the inference that DMS insisted on preferring charges against two members of DMS who were employed by GHA, after they submitted their resignations as members to DMS. The fact is that those two doctors, on November 11, 1937, at the insistence of GHA (R. 197) wrote a letter to the president of DMS (R. 454) withdrawing their resignations. It was not until long after the withdrawal of the resignations, and on November 22, 1937 (R. 455-456-457), that the CC&IM Committee referred the charges of violations of Section 5 of Article IV, and Sections 1 and 2 of Article III of Chapter IX of the Constitution to the Executive Committee for trial, and at the same time so advised the two doctors (R. 457). A full hearing, consisting of several sessions, was had before the Executive Committee, at which the two doc-

tors were represented by the legal staff of Home Owners' Loan Corporation (R. 558-559), and the Executive Committee on March 2, 1938, recommended to the full Society that Dr. Scandiffio be expelled (R. 560-561) and on March 16, 1938, the Society expelled him (R. 561-563) for the stated violations of its constitution.

B. Boycott of Group Health and Its Staff by the Washington Hospitals.

Respondent states (Br. 29) that both AMA and DMS proceeded to bring pressure to bear upon the Washington hospitals to exclude GHA doctors. Petitioners insist there is no such evidence.

Respondent says (Br. 24) that the AMA's action took the form of forcing the hospitals to comply with the "Mundt resolution" of 1934 suggesting that hospitals approved for intern training should be limited in their staffs only to doctors who are AMA affiliates. Petitioners insist that the Mundt resolution merely expressed an opinion by the House of Delegates of the AMA and referred the opinion to the Council on Medical Education and Hospitals to take under advisement (R. 779). Furthermore the uncontradicted evidence is that the AMA had received the request for inspection from Georgetown and Providence Hospitals February 3, 1937, at which time GHA had not even been incorporated, and the uncontradicted evidence is that at the time of the inspection of the hospitals in the summer of 1937 Dr. Peterson, who actually conducted the inspections, had not even heard of GHA (R. 870) and neither had his superior, Dr. Cutter (R. 785).

Respondent states (Br. 31) that one group (of DMS) favored sending a letter to the hospitals informing them of the particular sections of the constitution relating to ap-

proval of contracts and warning them that "if they failed to cooperate in every way that they might not be on the approved list" (R. 402) and that a letter giving effect to this proposal was drafted and approved by the Executive Committee (*ibid.*). Petitioners insist that there is no warrant in the record for this statement. Dr. Hooe (not a group) made a motion before the Executive Committee as to the first letter mentioned (R. 402) and Dr. Sprigg read a prepared letter (R. 402) but Dr. Sprigg's letter is not in the record and whether or not it proposed giving effect to Dr. Hooe's motion does not appear. At any rate neither Dr. Hooe's motion nor Dr. Sprigg's letter was ever approved by the Executive Committee or the Society. Dr. Willson's resolution of November 3, 1937, eliminated both of them.

Respondent (Br. 32) sets out in full Dr. Willson's resolution of November 3, 1937. Far from being part of a conspiracy, the uncontradicted evidence is that this resolution was conceived entirely by Dr. Willson and was submitted by him as a parliamentary procedure to prevent the sending of a letter proposed by Dr. Sprigg, and to have the matter referred to the Hospital Committee, where he believed the matter would end (R. 1270-1271).

Respondent states (Br. 34) that the DMS resolution of December 1, 1937, recommending as a matter of educational policy that, where possible, appointees to the staff of teaching hospitals be a member of DMS or a local medical society in his immediate neighborhood, would, if complied with, bring about the desired boycott of Group Health by the Washington hospitals. Petitioners insist that the recommendation or request contained in the resolution of December 1, 1937, was not evidence of boycott or restraint. A voluntary membership organization has the right to request, peacefully and without violence, exclusive employment rights for its members.

Respondent states (Br. 35) that the chairman of the Hos-

pital Committee of DMS also sent to each hospital a questionnaire requesting information concerning its correspondence with GHA and other information (R. 244, 595-596). That is an incorrect statement. At R. 244 Betty Logsdon testified that those questionnaires were sent to the hospitals but at R. 1360 she corrected her testimony in that regard and said the questionnaires were mailed to the members of the Hospital Committee of DMS and not to the hospitals.

Respondent states (Br. 37) that all of the local hospitals excluded all of GHA doctors because of their connection with that organization. It must be remembered that from January 27, 1938, to July 27, 1938, the petition of GHA for declaratory judgment (R. 640, 1424) against the United States District Attorney and the Superintendent of Insurance was pending in the District Court in which it was alleged that the United States District Attorney and the Superintendent of Insurance contend that GHA was illegally practicing medicine and illegally engaged in the business of insurance. The request of Dr. Selders, GHA surgeon, for hospital privileges was principally involved. The hospitals failed to act on his request or denied it because of the illegality of GHA (R. 496, 601, 602, 603, 619, 636, 640, 1162, 1163, 1205, 1275, 1340, 1347-1348) or because Dr. Selders was not qualified for the broad surgical privileges which he requested (R. 515, 529, 619, 1112, 1162, 1164-1165-1166, 1205, 1273, 1274, 1279, 1302, 1303-1305, 1309-1311, 1316-1318, 1323, 1327-1328, 1332, 1352, 1361-1363). Dr. Selders was from Houston, Texas, and had just completed his residency on July 1, 1937, in a hospital in Worcester, Massachusetts (R. 1277). No doctor in the District had ever been granted the broad surgical privileges requested for Dr. Selders (R. 1273, 1274, 1360-1363). Furthermore, GHA's president testified that a number of GHA's doctors had courtesy privileges at various hospitals during the indictment period (R. 641, 643-645).

Reply to Respondent's Argument.

I.

Respondent says the indictment charged and the proof showed a violation of Section 3 of the Sherman Act. Petitioners say they did not.

Petitioners in their brief logically considered first the question whether any of the activities alleged to have restrained were "trade" and second, whether if "trade", they were restrained. Respondent desires to argue first whether or not they were "restrained" and second, whether or not they were "trade". We will follow respondent's order of argument in this reply.

A. Respondent says any suppression of competition, by means of boycott or otherwise, violates the Sherman Act, irrespective of whether or not market prices are affected. Petitioners say that in order to establish restraint of trade under the Sherman Act it must be charged and proven that the restraint either fixed prices or suppressed competition to the extent that market prices were substantially affected to the injury of the public or competition substantially suppressed.

Respondent states (Br. 12) that petitioners conspired to boycott Group Health in order to prevent it from marketing medical services in competition with petitioner's members, and then argues that that is sufficient to show a violation of the Act. Petitioners insist that the indictment contains no charge whatever concerning, and there is no evidence of, price fixing or suppression of competition. Respondent contends that a combination to exclude a competitor from the market, irrespective of a charge or proof that prices were fixed or competition substantially suppressed to the injury of the public, is sufficient to violate the Act. Respondent insists this Court so held in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, and *Fashion Guild*

v. *Trade Commission*, 312 U. S. 457. Petitioners insist that this Court did not so hold. Respondent argues that the *Apex* case held that any "*suppression*" of "*competition*" violates the Sherman Act. Petitioners say the *Apex* case did not so hold. The conspirators in the *Apex* case took the Apex Company completely out of the market and completely destroyed all competitive efforts of the Apex Company. Yet in reversing the judgment (based on a jury verdict) against the conspirators this Court held (pp. 500, 501) that contracts, combinations or conspiracies are to be condemned under the Sherman Act *only* when their purpose or effect was to raise or fix the market price or substantially suppress competition to the injury of the public. *Fashion Guild* v. *Trade Commission, supra*, does not support respondent's argument. In that case the Fashion Originators' Guild directly sought to suppress competition of others who copied their designs (of women's garments and the textiles from which they were made) and sold the copies at *lower prices* than the original designs (p. 461). Thus competition was suppressed to the extent that market prices were substantially affected to the injury of the public.

B. Respondent asserts that but one restraint was submitted to the jury, i.e., restraint upon GHA in providing medical care to its members and that was a "restraint of trade." Petitioners say that activity was not trade, and further, four other alleged "restraints," none of which was trade, were submitted to the jury.

Respondent asserts that the activity of GHA in furnishing medical services to its members, which is one of the activities alleged to have been restrained, is commercial in nature and therefore "trade" under the Sherman Act. Petitioners submit that it is nothing of the sort. The furnishing by a corporation through hired employees, of

medical services, when the charges for such services go, not to the doctor employees, but into the corporation treasury, is just as much the practice of medicine as the furnishing of medical services by a doctor to a patient for a fee. Both are the practice of medicine. Both are activities in the learned professions and are therefore outside of the scope of the words "trade and commerce" under the Sherman Act. Respondent refers to Group Health's business of providing medical care in return for the payment of dues. But a doctor in private practice also provides medical care in return for fees, and a doctor who hires other doctors to assist him also provides medical care in return for fees. Could it be said that the doctor who hires doctors to assist him is in "trade" whereas the doctors who assist him are not?

Respondent, apparently realizing and conceding that four of the activities alleged to have been restrained are not "trade" and further that there was no evidence to show they were "restrained" in the sense required by law, undertakes to argue that the issues as to the restraints alleged against members of GHA, GHA's doctors, other doctors and the hospitals are not in issue and that the instructions of the court were really confined to the alleged restraint of the activities of GHA alone. Respondent strains mightily in an attempt to confine the indictment and the charge to conspiracy for the purpose of restraining GHA. But there are five purposes of restraint in the indictment and four of them cannot be blotted out. Even if respondent were not faced with the instructions that restraint on any one of the five activities was sufficient to convict (R. 1505-1508, 1515), it could not avoid the five specific motions of petitioners at the close of the Government's case (R. 728-729) and again at the close of all the evidence (R. 1453-1456) to direct a verdict for petitioners as to each of the five purposes of restraint alleged in the indictment. The court overruled

those motions, thus holding that there was some evidence for the consideration of the jury on each of the five alleged purposes to restrain five specific activities. Petitioners excepted to the denial of those motions (R. 1456) and preserved the points for review (R. 68, 76). But even if that were not so, the court in the instructions which it gave to the jury specifically instructed the jury that each of the five activities, alleged to have been restrained, was "trade" (R. 1505-1508, 1510) and petitioners excepted thereto (R. 1514, 1515), specifically pointing out that such activities were not "trade" (R. 1514, 1515), and preserved such exceptions for review (R. 69, 79). And finally, the court over objection of petitioners (R. 1513) sent the indictment with the jury in its deliberations (R. 1515), and petitioners preserved that for review. So respondent can get no solace from an attempted distortion of the instructions. If any one of the five activities alleged to have been restrained were not "trade" or if there is no evidence tending to show a restraint on any one of those activities "the conviction cannot be upheld". *Stromberg* v. *California*, 283 U. S. 359, 368, *Maryland* v. *Baldwin*, 112 U. S. 490, 493. In the *Stromberg* case, as here, it was impossible to determine whether or not the jury convicted for acts which did not constitute a crime.

Moreover the present contention that the charge concerns the activities of GHA alone is pure afterthought. Petitioners in demurring to the indictment contended that none of the five activities alleged to have been restrained was trade. Respondent contended they were trade. In the District Court and in the court below and in this Court (previous petitions for certiorari) respondent heretofore has contended that the indictment charged a conspiracy to restrain not one, but five activities. The District Court held none of those activities was trade. The Court of Appeals in re-

versing for a trial held all five activities were trade. The case was tried on that theory. The Court of Appeals affirmed the convictions on that theory. Hence we submit respondent's present contention comes a little late and is an attempt to avoid the decisions cited in our brief (p. 32).

Respondent argues (Br. 58) that a non-profit corporation may be engaged in trade. Petitioners agree that a non-profit corporation organized under a statute authorizing incorporation for commercial purposes and engaged in commercial business activities may be in "trade". GHA was organized under a statute providing for the incorporation of charitable, educational and religious associations,[4] was not engaged in commercial activities and petitioners insist a corporation so organized and operating cannot be in "trade".

Respondent insists that this Court did not mean what it said in the *Apex* case when it limited the field of the Sherman Act to commercial activities. It seems significant that in every instance in that opinion, where the nature of field covered by the Sherman Act was discussed, this Court carefully used the clarifying word "commercial". In so holding this Court but followed the many cases which carefully distinguish between "trade" and non-commercial pursuits and activities.

II.

Respondent says petitioners are not within any immunity conferred by Section 20 of the Clayton Act. Petitioners say a dispute concerning terms and conditions of employment of doctors, which was within the Clayton and Norris-La Guardia Acts, was involved, in which petitioners were interested.

It will be noted that respondent avoids reference to the

[4] Act of March 3, 1901, c. 854 (31 Stat. 1283) D. C. Code 1940, Title 29, Sections 29-601 to 29-605 (for the incorporation of charitable, educational and religious associations).

Norris-La Guardia Act. Respondent suggests (Br. 65) that Section 20 of the Clayton Act is confined to any case "between an employer and employees". Of course that is not correct, but if it were, it would be immaterial, considering the Norris-La Guardia Act and *United States* v. *Hutcheson*, 312 U. S. 219. In *Columbia River Co.* v. *Hinton*, 315 U. S. 143, at p. 146 this Court said:

> "We recognize that by the terms of the Statute (Norris-La Guardia Act) there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee."

Respondent does not seem to argue that no dispute concerning terms and conditions of employment of doctors is involved in this case, or to argue that petitioners were not interested in such a dispute, but ignores that situation and argues that petitioners objected to Group Health's plan of providing medical care. In view of the ten record references in petitioners' brief after certiorari granted (Br. 58, 59, footnote 24) and the seven admissions of respondent in that regard pointed out in that brief (Br. 59, 60, footnote 25) it cannot be successfully denied that a dispute concerning terms and conditions of employment of doctors, which was within the Clayton and Norris-La Guardia Acts, was involved, in which petitioners were directly or indirectly interested. A mere indirect interest is sufficient under Section 13(a) of the Norris-La Guardia Act, 29 U. S. C. 113a.

Respondent makes an ingenious argument that petitioners are a trade association but petitioners insist that, if the practice of medicine be "trade," they are not one whit different so far as their rights under the Clayton and Norris-La Guardia Acts are concerned than a carpenters' union which becomes involved in a dispute with a corporation, a carpenter contractor, which insisted on employing members of the carpenters' union on a monthly

salary basis as distinguished from their established hourly rate. Carpenters sell their services at their established hourly rate on a case-to-case or job-to-job basis. Respondent's theory that petitioners are trade associations is not tenable. Suppose a corporation was formed, with members who required the services of carpenters from time to time, and the corporation hired union carpenters on a monthly salary, who rendered carpenters' services to the members, and the carpenters' union objected and expelled the corporation's carpenters from the union, is it conceivable that the carpenters' union would not be protected by the Clayton and Norris-La Guardia Acts?

In *Columbia River Co.* v. *Hinton*, 315 U. S. 143, cited by respondent, no question concerning terms and conditions of employment was involved. But this Court made it clear in that case that if the dispute involved wages or hours, or terms or conditions of employment, the Clayton and Norris-La Guardia Acts would apply. As heretofore pointed out, it is clear that a dispute concerning terms and conditions of employment of doctors is involved in this case, in which petitioners were interested.

GHA doctors neither charge nor receive fees for their services. The fees (dues) paid by the patient (GHA member) go into the treasury of the corporation. The doctor remains on a salary basis, in the same manner as any other employee of GHA. There is no difference between the corporate device of GHA here involved, and the multitude of cases which have denied corporations the right to sell medical services through a staff of hired doctors.

Notwithstanding the undisputed employment situation, respondent now argues (Br. 72, 73) that the doctors employed by GHA are independent contractors and not employees of GHA. This case was not tried on that theory and petitioners insist that this contention is frivolous in

view of the record here which shows that GHA employed members of petitioners on a salary, full time, to perform GHA's corporate medical work, that such employees had no private practice of their own, worked in offices supplied and furnished by GHA, all under the direction of an employee of GHA (Medical Director) (R. 152, 154, 157, 160, 173, 237, 293, 295, 306, 361, 380-381, 499, 500, 619, 629, 631, 647, 649, 700, 701, 1359). It was the dispute over the terms and conditions of such employment by GHA of members of petitioners that was the matrix of this controversy (R. 290-309, 176-197).

Conclusion.

It is respectfully submitted that the judgments below should be reversed.

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